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No. 90-457

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ADELE GRAHAM, individually and as representative of a class of persons similarly situated,

Petitioner,

vs.

STATE OF NEW YORK; DEPARTMENT OF CIVIL SERVICE; EDWARD V. REGAN, as Comptroller of the State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit correctly deny retroactive retirement health insurance benefits prior to August 1, 1983 where the employer's obligations under Title VII were not clear until this Court's 1983 decision in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983) and liability for pre-*Norris* conduct was foreclosed by *Florida v. Long*, 487 U.S. 223 (1988)?

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INTRODUCTION

Petitioner, Adele Graham, individually and on behalf of a proposed class of female employees of the State of New York who retired prior to August 1, 1983, seeks review of the judgment of the United States Court of Appeals for the Second Circuit, dated June 28, 1990, which affirmed the judgment of the United States District Court for the Southern District of New York, dated November 16, 1989, dismissing the complaint. The complaint

alleged that respondents State of New York, Department of Civil Service and Edward V. Regan, as Comptroller, violated petitioner's rights, *inter alia*, under 42 U.S.C. § 2000e *et seq*. ("Title VII") and 42 U.S.C. § 1983 by using sex-based actuarial tables prior to August 1, 1983 to determine monthly credits toward the cost of health insurance available under State law to retired employees.[1] Petitioner sought retroactive relief in the form of recalculation of her retirement benefits, including compensation for past losses, and equalization of future benefits.

The Court of Appeals held that retroactive relief is inappropriate in this case in light of this Court's decision in *Florida v. Long*, 487 U.S. 223 (1988). *Graham v. State of New York, Department of Civil Service*, 907 F.2d 324 (2d Cir. 1990). The court concluded that retroactive relief should be denied because: (1) the State was not on notice prior to this Court's decision in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), that its health insurance credit practice violated Title VII (A. 119a);[2] (2) the State's prompt and voluntary compliance with the law obviated the need for a retroactive award (A. 121a-122a); and (3) the effect of a retroactive award would be inequitable both to the State and to male retirees. (A. 128a)

Since the holding of the court below does not conflict with decisions of this Court or of other circuits or with the decisions of the highest state courts within the Second Circuit, this Court should deny the petition for a writ of certiorari.

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[1] The complaint also named as a defendant Mario Cuomo as Governor of the State of New York. By stipulation dated September 14, 1987, the claims against the Governor and the State of New York were dismissed. (A.a 15) References preceded by "A.a" are to the Joint Appendix filed on appeal to the Court of Appeals.

[2] References preceded by "A." are to pages of the appendix to the petition.

Statement of the Case

A. *Background*

New York Civil Service Law ("CSL") § 164 provides that retired state employees may participate in the health insurance plan established for state employees. Pursuant to CSL § 167, part of the cost of this insurance is paid by the State and the balance is paid by the employee in the form of deductions from his or her retirement allowance. Premiums payable by the employee may be reduced by a monthly credit based upon the amount of sick leave earned by the employee, but not used prior to retirement. CSL § 167.4. (A. 136a-142a)

Under these provisions, the monthly credit available is fixed at the time an eligible employee in state service retires. CSL § 167.4. The amount of the credit is calculated by multiplying the amount of unused sick leave by the employee's salary at retirement, thereby assigning a dollar value to the unused sick leave. The dollar value is then divided by the number of months in the retiree's life expectancy as determined by means of actuarial tables. The amount of the monthly credit is added to the State's share of the retiree's insurance premium. Under CSL § 167.4, employees are notified at the time of retirement of the monthly credit to which they are entitled and the retiree pays the remaining portion of the monthly premium.

Prior to August 1, 1983, the State used sex-based actuarial tables to calculate the amount of the monthly credit. Since then, it has used unisex actuarial tables to make the calculation in full compliance with this Court's decision in *Arizona Governing Committee v. Norris*, 463 U.S. 1073 (1983), which held that as of August 1, 1983, benefit levels could not be determined by reference to sex-based actuarial tables.

B. *Prior Proceedings*

This action was commenced in 1984 by petitioner Adele Graham, a former State employee who retired in 1981 – prior

to the *Norris* decision.[3] The complaint alleged that use of gender-based actuarial tables to calculate the amount of credit for unused sick leave was a violation of Title VII because, although *Norris* was not decided until after Ms. Graham retired, the State allegedly had notice since 1978 that use of sex-distinct actuarial tables was unlawful by virtue of this Court's decision in *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 701 (1978). Notwithstanding the fact that retroactive relief was denied in *Manhart*, the complaint sought retroactive as well as prospective relief, including compensation for past losses and equalization of future benefits.

The parties cross-moved for summary judgment on the issue of whether a proposed class was entitled to retroactive relief. The District Court (Connor, J.) held in *Graham v. State of New York, Department of Civil Service*, 653 F. Supp. 1363 (S.D.N.Y. 1987) that *Manhart* put respondents on notice that their use of gender-based actuarial tables was illegal. Subsequently, the parties entered into two stipulations, the first, dismissing the claim against the State and the Governor of New York, and the second, defining two sub-classes.[4] While the State's appeal from the decision was pending, this Court announced its decision in *Florida v. Long*, which held that *Norris*, and not *Manhart*, established "the controlling liability date [with respect to pension plan benefits calculated on the basis of sex-distinct actuarial tables]

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[3] A second plaintiff, Tamaara Danish, who had not yet retired as of 1984, conceded before any decision was issued by the District Court that she was not affected by the actuarial tables in issue.

[4] The classes were described as follows:

> (1) Female New York State employees who retired between April 25, 1978 and July 31, 1983 and who at the time of retirement had accumulated unused sick leave and who paid, during said period, health insurance premiums to the State.
>
> (2) Female New York State employees who retired between April 25, 1978 and July 31, 1983 and who at the time of retirement had accumulated unused sick leave and who, after August 1, 1983 paid health insurance premiums to the State.

(A.a 13-14)

and that liability may not be imposed for pre-*Norris* conduct." *Long*, 487 U.S. at 229. Subsequently, the Second Circuit remanded the case to the District Court for reconsideration in light of *Florida v. Long*. *Graham v. State of New York, Department of Civil Service*, 861 F.2d 381 (2d Cir. 1988).

On remand, the District Court vacated its earlier opinion and dismissed the claim for retroactive relief. *Graham v. State of New York, Department of Civil Service*, 716 F. Supp. 802 (S.D.N.Y. 1989). In reviewing the *Manhart*, *Norris* and *Long* decisions, the District Court found that: (a) like *Norris*, this case involves benefits, and not, as in *Manhart*, contributions, and (b) the criteria applied by this Court in *Long* in denying retroactive relief under Title VII required that retroactive relief be denied in this case. The court concluded that,

> "[s]ince *Long* has undermined my earlier decision, and since I find Graham's alternative grounds for retroactive relief unpersuasive, plaintiff's claim for such relief is dismissed."

Graham, 716 F. Supp. at 803.[5] Judgment was entered on November 16, 1989.

C. *The Decision Below*

On June 28, 1990, the Court of Appeals for the Second Circuit affirmed the decision of the District Court in all respects. *Graham v. State of New York, Department of Civil Service*, 907 F.2d 324 (2d Cir. 1990). The court held, preliminarily, that although this case involves a health benefit financed with annual appropriations and not a fixed pension fund, the retroactivity analysis applied by this Court in *Long* is applicable here. In the court's view, the *Long* analysis is "sensitive to the difference" between the two kinds of benefits and its rationale is

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[5] Subsequently, petitioner voluntarily discontinued the remaining causes of action under the United States Constitution, the New York State Constitution, 42 U.S.C. § 1983 and contract law. (A.a 141)

"instructive" outside of the pension context, in particular, in "Title VII cases involving the use of gender-based actuarial tables." (A. 101a-104a) Accordingly, the Second Circuit stated that petitioner had "underestimate[d] the usefulness of the decision in assessing the appropriateness of retroactive relief in related Title VII contexts." (A. 104a)

Applying the *Long* criteria, the court found initially that *Manhart* did not give notice to New York that it was unlawful to use gender-based actuarial tables to determine the appropriate monthly credit toward the cost of retirees' health insurance because the practice in this case involves unequal benefits, rather than unequal contributions. (A. 110a-111a) The court noted that whether New York's co-insurance scheme may be characterized as involving unequal benefits or contributions depends on the perspective from which one views the system. Because the issue of notice "focuses on the knowledge of the State at the time it engaged in the discriminatory conduct," the court held that "fairness requires that we view the practice from the State's rather than the retiree's perspective." (A. 109a-110a) Additionally, the court ruled that even if the health insurance scheme involved unequal contributions, "given the ambiguities inherent in characterizing the State's practice in this case as a benefit or contribution, we would be reluctant to conclude that *Manhart* gave the State fair notice of the illegality of its practice." (A. 111a)

The court also found that the State's prompt and voluntary compliance with the law obviated the need for a retroactive award as a deterrence. Finally, the court concluded that a retroactive award would be inequitable both to the State, which would be required to incur additional financial obligations, and to male retirees who reasonably relied on a specified monthly credit and whose benefits, therefore, should not to be reduced to finance a retroactive award. (A. 122a-128a)

In a separate opinion, Judge Feinberg concurred in the result. Although he viewed the case as involving contributions rather than benefits, he agreed with the majority that, due to the complexity of the sick leave health insurance credits system, "New York could . . . reasonably have concluded that the challenged

statutory scheme involved benefits and not contributions" and, therefore, *Manhart*, "did not put the State on fair notice that it was violating Title VII." (A. 129a-132a)

REASONS FOR DENYING THE WRIT

A. The Court Below Correctly Applied The Criteria In *Florida v. Long* In Holding That Petitioner Is Not Entitled To Retroactive Relief

Petitioner argues, as she did below, that *Long* is inapplicable because its analysis is limited to pension cases, and this case does not involve a pension. The Court below correctly rejected this argument.

In essence, petitioner seeks to have it both ways. For purposes of establishing liability and the date liability attaches, she relies on the *Manhart* rule applicable to pensions. At the same time, however, she argues that this is not a pension case for purposes of determining if retroactive relief is warranted and, therefore, the *Long* criteria are inapplicable.

The inconsistency in petitioner's arguments illustrates the correctness of applying *Long* here. Contrary to petitioner's assumption, it is not the specific nature of the plan which determines whether *Long* applies, but, rather, whether the State's use of sex-based actuarial tables in implementing its retirement benefits plans is discriminatory. As the court below found, the flexible analysis employed in *Long* is reasonably applied in Title VII cases involving the use of gender-based actuarial tables in the calculus of retirement benefits because it is "sensitive" to the differences in benefits and the way they are funded. (A. 103a-104a)

Thus, there is no basis for petitioner's fear that the decision below makes *Long* applicable to "all kinds of factual situations which have no rational relationship to the *Long* reasoning." Nor does it "undermine" the rules regarding retroactive relief available in all Title VII cases. (Petition at 17) Rather, the court correctly took into account the fact that this case, like *Long*,

involves the use of gender-based actuarial tables in determining retirement benefits. Therefore, it is properly analyzed under the *Long* criteria as a "related Title VII" case. (A. 103a)

Petitioner's argument that *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) is applicable was rejected by this Court in *Manhart*, *Norris*, and *Long* and should be rejected here. Since Congress stressed the importance of " 'making only gradual and prospective changes' in the legal rules governing pension plans, 435 U.S. at 721-22, n. 40," this Court "concluded, *in general terms*, that the '*Albemarle* presumption in favor of retroactive relief' should not be applied to *this type* of Title VII pension plan suit." *Long*, 487 U.S. at 236 (citing *Manhart*, 435 U.S. at 723) (emphasis added).

The Court thus indicated that it is not simply because these cases were pension cases that *Albemarle* was inapplicable. Rather, it concluded that *Albemarle* was inapplicable to pension cases involving gender-based actuarial tables. Since the claim in this case is also predicated on the use of gender-based actuarial tables, *Albemarle* is inapplicable here, as well. As in *Manhart* and *Norris*, the employer here could have reasonably assumed that its plan was lawful because the practice was based on objective life expectancy tables and did "not entail discrimination in any normal understanding of that term." *Norris*, 463 U.S. at 1104-05 (Powell, J.) (dissenting in part and concurring in part). Therefore, this case differs from other types of Title VII cases to which *Albemarle* has been applied.

Petitioner has also failed to demonstrate that the issue of whether *Long* should be applied to the scheme involved in this case is of widespread importance. She has made no showing that the scheme used in New York for providing health insurance, or any similar benefits, to retirees is duplicated elsewhere or, if it is, whether gender-based tables were relied upon at any time in calculating the benefits. Moreover, she has failed to raise serious questions about the correctness of the Court of Appeals' application of this Court's decision in *Long*.

1. *Prior to* Norris, *The State Was Not On Notice That Its Plan Was Impermissible*

The first criterion identified in *Long* for determining when retroactive relief is appropriate is whether the State was on notice that its plan was discriminatory. This Court found in *Long* that the State did not have the requisite notice. It concluded that *Manhart* did not alert pension fund administrators that unequal benefits violated Title VII because its holding there was specifically limited to unequal *contributions* and explicitly left open the issue of whether Title VII precluded unequal *benefits*.

Petitioner contends that this case is not governed by *Long* because, in petitioner's view, the State was on notice following the 1978 *Manhart* decision that its use of sex-based actuarial tables in calculating the value of unused sick leave credits was impermissible since such calculations involved contributions and not benefits. The court below, however, rejected this view and correctly held that since this is a "benefits" case, the State did not have notice until 1983, when *Norris* was decided, that using actuarial tables in this context was impermissible.

In support of her argument that this case is governed by *Manhart*, petitioner cites the repeated use of the term "contributions" in CSL § 167.4. This argument, however, is semantic and conceptually incorrect because it ignores the difference between the operation of CSL § 167.4 and the "contributions" at issue in *Manhart*.

The "contributions" in *Manhart* were monetary reductions in the amount of monthly take-home pay during the course of employment. Contributions of female employees to the retirement fund were 14.84% higher than those of male employees. This inequality meant that female employees took home less pay each pay period than males earning the same salary. *Manhart*, 435 U.S. at 705.

By contrast, the statutory scheme in this case is entirely benefits oriented. Unlike *Manhart*, it involves no inequality of pay. Also, unlike *Manhart*, the so-called "contribution" in this

case occurs at the time of retirement, rather than during the course of employment. In addition, there is no inequality in the accumulation of sick leave or in assigning a dollar value to the unused sick leave which is "contributed" and is the basis for the monthly credit. The difference in treatment arises in calculating the actuarial value of the unused sick leave in order to determine the amount to be paid by the State vis-a-vis the amount to be paid by retired employees during the course of their projected retirement years.

Thus, the plan in this case involves a calculation which determines the amount received as a post-retirement benefit, as well as the amount the retiree must pay, and not an ongoing employee contribution during the course of employment. Since the "contribution" occurs precisely at the point at which the benefit is received, the instant case bears no factual similarity to *Manhart*, and most closely resembles the distribution of benefits at issue in *Norris*.

In holding that the State was not on notice prior to *Norris* that its health insurance practice violated Title VII, the Second Circuit recognized that a co-insurance scheme using sex-differentiated actuarial tables involves both unequal benefits and unequal contributions, depending on the perspective from which one views the practice. It correctly concluded that since notice focuses on the knowledge of the State at the time it engaged in the discriminatory conduct, fairness requires that the practice be viewed from the State's perspective. (A. 110a)

Moreover, as the court below recognized, even if the plan at issue involves contributions, it would still be unfair, given the difficulty of determining whether it involves contributions or benefits, to charge New York with pre-*Norris* notice of the unlawfulness of its scheme.

Petitioner cites *New York State Department of Civil Service v. New York State Human Rights Appeal Board*, 66 A.D.2d 309, 414 N.Y.S.2d 46 (3d Dep't 1979) and *Fitzpatrick v. Bitzer*, 390 F. Supp. 278 (D. Conn. 1974), *rev'd in part on other grounds*, 519 F.2d 559 (2d Cir. 1975), *rev'd on other grounds*, 427 U.S.

445 (1976), as evidence that the State had notice prior to *Norris* that its statutory scheme was discriminatory. However, as explained by the court below, neither case presented the issue of whether the State's use of sex-based actuarial tables was prohibited in calculating post-retirement benefits. (A. 112a-119a) Similarly, *Spirt v. TIAA-CREF*, 475 F. Supp. 1298 (S.D.N.Y. 1979), *aff'd in part and rev'd in part*, 691 F.2d 1054 (2d Cir. 1982), *vacated* 463 U.S. 1223, *modified* 735 F.2d 23 (2d Cir.), *cert. denied*, 469 U.S. 881 (1984), also relied upon by the petitioner, did not provide notice to the State that its plan was unlawful. *Spirt* was still pending on appeal when the *Norris* case was decided by this Court and was not finally decided until approximately one year after *Norris*. As the court below correctly observed, the duty of agencies to follow the decisions of the court of appeals in their jurisdiction only attaches to final decisions. (A. 115a-116a, citing *Long*, 487 U.S. at 233.)

2. *A Retroactive Award Would Not Serve The Goal Of Deterrence Since The State Switched To Unisex Actuarial Tables Immediately After* Norris

The second criterion specified by *Long* for determining the appropriateness of retroactive awards is whether such relief is necessary to deter deliberate violations or grudging compliance by employers. *Long*, 487 U.S. at 230. In *Long*, this Court confirmed its earlier determinations in *Manhart* and *Norris* that "In the pension context, we have considered whether retroactive awards are necessary to further the purposes of Title VII and to ensure compliance with our decisions," *Long*, 487 U.S. at 235 (citing *Manhart*, 435 U.S. at 720-21); *Norris*, 463 U.S. at 1110 (O'Connor, J., concurring).

Since New York, like Florida, acted immediately after *Norris* to implement a sex-neutral plan with respect to post-August 1, 1983 retirees, it is clear that a retroactive award is not necessary here to compel compliance. Accordingly, the court below correctly concluded that, "[i]n view of the State's prompt and voluntary compliance with the law a retroactive award against the State is not necessary to insure the fulfillment of Title VII's goals." (A. 121a-122a)

3. *A Retroactive Award Would Impose An Unwarranted Financial Impact*

The third criterion applied in *Long* was whether a retroactive award would have a financial or contractual impact on the plan. In *Long*, this Court declined to require the employer to pay additional monies because, to apply retroactive awards to employer-operated plans that "did not anticipate our decision, would impose financial costs that would threaten the security of both the funds and their beneficiaries." *Long*, 487 U.S. at 236. The Court also precluded retroactive relief which would result in "harm to other retirees as innocent third parties." *Id.* Petitioner contends that the amount required for a retroactive award is *de minimus* and, therefore, overcomes the reservations expressed in *Long*. This argument was properly rejected by the court below.

Petitioner's argument that the amount of funds needed to satisfy the retroactive reward is *de minimus* is irrelevant. The Court expressly rejected this theory in *Long*, stating:

> "We will not adopt the premise that the appropriateness of a retroactive award turns on a particular pension fund's current financial status, so that financially successful pension funds pay but financially insecure pension funds do not. To do so imposes a penalty for prudent management."

Long, 487 U.S. at 237. Therefore, the Court concluded that "particular circumstances" of a case "should not control a decision that must be based on a broad principle." *Id.*

Moreover, as the court below correctly held, it would be "inequitable" to reduce benefits to male retirees to fund a retroactive award. (A. 124) *Spirt v. TIAA-CREF*, 735 F.2d 23, upon which petitioner relies, is distinguishable. In *Spirt*, the Second Circuit granted retroactive relief after finding that neither the employer nor the plan would be burdened with additional financial obligations, and that there would be no reduction in the annuities to which male retirees were entitled because the plan in *Spirt* did not guarantee male retirees a certain stream of income. By contrast, the plan in the instant case informs male

retirees that the State will make a specified monthly contribution toward the cost of their health insurance for the remainder of their lives.

The analysis of *Long*, therefore, supports the conclusion of the Court below that retroactive relief is inappropriate in this case.

B. *The Decision Of The Court Below Is Not In Conflict With The Decisions Of The Highest State Courts Within The Circuit*

Petitioner claims that the decision of the court below conflicts with the decisions of the highest courts of both Connecticut and New York, citing *State v. Commission on Human Rights*, 211 Conn. 464, 559 A.2d 1120 (1989), and *Lippman v. Board of Education of the Sewanhaka*. 66 N.Y.2d 313, 496 N.Y.S.2d 987 (1985). There is no merit to petitioner's argument.

Unlike the instant case, the state cases relied on by petitioner did not involve Title VII. Rather, they addressed state law claims and were adjudicated under state law. Indeed, in *State v. Commission*, the Connecticut Supreme Court expressly noted that *Manhart*, *Norris* and *Long* are "not binding on this Court's interpretation of Connecticut antidiscrimination statutes." 559 A.2d at 1128.

In addition, the decision of the New York Court of Appeals in *Lippman v. Board of Education of the Sewanhaka*, also provides no basis for granting certiorari in this case. *Lippman*, which predates *Long*, held that health insurance benefits are not protected by Article V, section 7 of the New York State Constitution and that there is no contractual impediment to a reduction in the employer's contribution toward health insurance premiums. 66 N.Y.2d at 317. Accordingly, *Lippman* has relevance, if at all, only to the third prong of the *Long* test, *i.e.*, the financial or contractual impact. While the court below recognized that CSL § 167 does not guarantee that the benefits of employees under the plan will not be diminished, it concluded that since employees are informed upon retirement that the State will make a specified monthly contribution towards the cost of

their health insurance, they could reasonably rely upon a specified monthly benefit. (A. 127a-128a) The court determined that, in these circumstances, it would be "inequitable" under *Long* to reduce benefits to male retirees to fund a retroactive award. *Id.* Therefore, the court's decision does not conflict with *Lippman*, but, rather, constitutes a proper application of *Long*.

CONCLUSION

The decision below is a straightforward, and unexceptionable, application of this Court's decision in *Long*. Petitioner has offered no principled reason to explain why the *Long* analysis is inapplicable to New York's use of gender-based tables. Nor has she shown that the issue is one of widespread public importance. Accordingly, the petition for a writ of certiorari should be denied.

Dated: New York, New York
November 15, 1990

Respectfully submitted,

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